Summary of Argument.

I.

The federal courts are required to arrange the parties to the litigation according to their sides in the primary and controlling matter in dispute and, after so arranging the parties, to determine whether the requisite diversity of citizenship existed to support federal jurisdiction of the action.

II.

The rules of decision of this Court require that the corporate defendant in a shareholder's derivative action be aligned as a party-plaintiff in the litigation where, as in the present case, it is determined that the corporation was not dominated or controlled by persons antagonistic to the corporation's financial interests in the subject matter of the litigation.

III.

Disagreement between a shareholder and the responsible officers and directors of his corporation as to the wisdom of asserting a cause of action which the shareholder contends the corporation has, does not give rise to such "antagonism of interest" so as to require the corporation to be aligned as a party-defendant in a derivative action brought by the shareholder to enforce the alleged cause of action, where, as in the present case, such officers and directors are found to be *not* antagonistic to the financial interests of the corporation in the subject matter of the litigation and *are* found to be acting in good faith and free from legal duress.

ARGUMENT.

I.

The District Court Was Both Empowered and Required to Determine Whether the Requisite Diversity of Citizenship to Support Federal Jurisdiction Existed, and, for That Purpose, to Inquire Into the Jurisdictional Facts Necessary to Determine the Proper Alignment of the Parties.

The existence of the requisite diversity of citizenship to support federal jurisdiction is dependent upon the proper alignment of the parties in the action.

Indianapolis v. Chase National Bank, 314 U. S. 63 (1941);

Niles-Bement-Pond Co. v. Iron Moulders Union, 254 U. S. 77 (1920).

As in the case of any other jurisdictional fact, the District Court was not bound by the pleadings and the burden was upon the Petitioner, since he invoked the jurisdiction of the federal court, to prove the facts necessary to sustain federal jurisdiction.

Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co., 197 U. S. 178 (1905);

Gilbert v. David, 235 U. S. 561 (1915);

McNutt v. G. M. A. C., 298 U. S. 178 (1936);

KVOS, Inc. v. Associated Press, 299 U. S. 269 (1936).

The District Court was required to determine whether the parties were properly aligned according to their sides with respect to the primary and controlling matter in dispute, and, when it found that they were not properly aligned, to realign them and to determine whether federal

diversity jurisdiction existed based upon such realignment. The extent of the District Court's duty in this respect, and the principles involved, are succinctly stated by Mr. Justice Frankfurter in *Indianapolis v. Chase National Bank, supra,* as follows:

> "Though variously expressed in the decisions, the governing principles are clear. To sustain diversity jurisdiction there must exist an 'actual,' *Helm v. Zarecor,* 222 U. S. 32, 36, 'substantial,' *Niles-Bement-Pond. Co. v. Iron Moulders Union,* 254 U. S. 77, 80, controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. *Strawbridge v. Curtiss,* 3 Cranch 267. Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.' *Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co.,* 197 U. S. 178, 180. Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary 'collision of interests,' *Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co., supra,* at 181, exists, is therefore not to be determined by mechanical rules. It must be ascertained from the 'principal purpose of the suit,' *East Tennessee V. & G. R. v. Grayson,* 119 U. S. 240, 244, and the 'primary and controlling matter in dispute,' *Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A.,* 151 U. S. 368, 385. These familiar doctrines governing the alignment of parties for purposes of determining diversity of citizenship has consistently guided the lower federal courts and this Court." (Pp. 69-70.)

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IN THE

Supreme Court of the United States

October Term, 1956

No. 316

CHARLES B. SMITH, as Special Administrator of the Estate of Edward S. Birn, Deceased,

Petitioner,

vs.

MILTON SPERLING, HARRY M. WARNER, JACK L. WARNER, UNITED STATES PICTURES, INC. and WARNER BROS. PICTURES, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENTS UNITED STATES PICTURES, INC. AND MILTON SPERLING.

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In the present case, the District Court followed the principles enunciated in the aforementioned cases, conducted an extensive trial of the jurisdictional issues, and, based upon the evidence thereby disclosed, determined that Warners should be aligned on the side of the plaintiff. Since this resulted in there being a Delaware cititzen as a plaintiff (Warners) and a Delaware citizen as a defendant (United), the court properly dismissed the action for lack of diversity of citizenship.

The Petitioner appears to concede the principles enunciated in *Indianapolis v. Chase National Bank, supra,* but he advances the theory that Warners, on whose behalf and in whose interests he purports to act, should be aligned as a defendant in the action because he and Warners' Board of Directors differ on the question of whether it is in the interests of Warners to bring this suit.[7]

The fallacy in this theory is evident when it is recognized that the long established principles of equity (now embodied in Rule 23(b), F. R. C. P.) require, as a condition precedent to the institution of a derivative action by a shareholder, that the corporation on whose behalf the suit is ostensibly brought refuses to bring such action itself. Accordingly, under Petitioner's theory, no question as to the proper alignment of the corporate defendant could ever arise since, in order for the shareholder to

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[7]In this connection, it should be noted, as pointed out above, that the District Court found that the members of Warners' Board considered the Warners-United contract to be a sound business arrangement for the best present and future interests of Warners [Finding of Fact IV, R. p. 75], and that the evidence showed that the projected benefits to Warners under the contract would exceed $11,000,000 [Testimony of S. Schneider, vice-president and director, R. p. 529].

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENTS UNITED STATES PICTURES, INC. AND MILTON SPERLING.

Question Presented.

The sole question presented by this case is whether, for the purpose of determining if federal diversity jurisdiction existed in a shareholder's derivative action, it was error for the District Court to realign as a party-plaintiff the corporation on whose behalf the action is ostensibly brought, but who was named as a defendant in the complaint, where:

(A) The District Court held a preliminary trial of the issue of jurisdiction; and

(B) The District Court found, contrary to the allegations of the complaint: (1) that the acts complained of were performed in good faith, without fraud, and were considered by the Board of Directors of the corporation to be for the best present and future interests of the corporation; (2) that the directors of the corporation in fact acted in good faith, in the exercise of their independent business judgment and without any domination or control being exerted over them at the time of the transaction complained of or at any other time referred to; (3) that the corporation was not, at any time referred to, in the hands or under the control of anyone antagonistic to the financial interests of the corporation; and (4) that the directors and officers of the corporation were in no way disqualified from enforcing the corporation's rights.

Statement.

The present case is a typical shareholder's derivative action, brought by a shareholder of Warner Bros. Pictures, Inc. (hereinafter for convenience referred to as "Warners") ostensibly for the benefit of Warners. The plaintiff asserted two causes of action (a third cause of action alleged in the complaint was dismissed upon stipulation of the parties) but only the first cause of action, and the dismissal thereof by the court below, is involved in this petition.[1]

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[1]Neither defendant United States Pictures, Inc. nor defendant Milton Sperling were named as parties to the second cause of action.

By way of formal compliance with Rule 23(b), Federal Rules of Civil Procedure, the plaintiff alleged in his complaint that the action was not a collusive one insofar as federal jurisdiction thereof is concerned [Complaint, par. 1; R. p. 3]; that he was the owner of 400 shares of stock of Warners from a time prior to the acts complained of [Complaint, par. 4; R. p. 4]; and the reasons for plaintiff's failure to make any demand upon the directors of Warners to institute this action, to wit: that such demand would be futile because all or a majority of the Board of Directors allegedly wrongfully participated in the acts complained of and that the Board of Directors was allegedly dominated and controlled by two of the individual defendants, Harry M. Warner and Jack L. Warner [Complaint, par. 24; R. p. 11].

Warners, a Delaware corporation, was named as a defendant in the first cause of action, together with United States Pictures, Inc. (hereinafter called "United"), also a Delaware corporation, Milton Sperling, president and a director and stockholder of United, and Harry M. and Jack L. Warner, officers, directors and stockholders of Warners; all of the individuals named as defendants were asserted to be citizens of the State of California. Federal jurisdiction was alleged to be based on diversity of citizenship of the parties.

The transaction complained of by plaintiff was the making of a certain contract between Warners and United for the production of a number of motion pictures by United, which were to be partially or completely financed

the only facts before the Court were those alleged in the bill. It was alleged that the defendant, James J. Hill, exercised absolute domination and control over the corporation and, thereby, realized substantial personal profits from the sale to the corporation of securities which he personally owned.

The Court, noting the above facts, held that even though the relief prayed for was for the financial benefit of the corporation, the facts alleged showed that the illegal conduct and injury complained of resulted from the joint action of the corporation and Hill, that Hill dominated and controlled the corporation, and, therefore, it was proper to align the corporation as a party-defendant for the purpose of determining federal diversity jurisdiction. The Court said:

> "The case of *Doctor v. Harrington* is directly in point on this branch of the case and is conclusive." (209 U. S. at p. 32.)

With respect to the other and separate issue before the Court in the *Venner* case, namely, whether the complainant had complied with Equity Rule 94, the Court merely noted in its consideration of this branch of the case that the "plaintiff in *Doctor v. Harrington* complied with the requirement of the rule" (209 U. S. at p. 33).

Accordingly, we submit that Petitioner's contention that the domination and control of the corporation by defendant Harrington in the *Doctor* case was considered only in relation to the issue of whether the complainant therein complied with Equity Rule 94, is at complete variance not only with the opinion in the *Doctor* case, but also with this Court's own interpretation of the *Doctor* case, in *Venner v. Great Northern Railway Co.*

In addition, and by way of absolute refutation of Petitioner's attempt to restrict the application of the *Doctor* case to the question of compliance with Equity Rule 94, is this Court's more recent interpretation of the *Doctor* decision in the *Koster* case. There, it was held unequivocally that the *Doctor* case was on the point of *diversity jurisdiction.*

We recognize that allegations of domination and control of the corporation in a shareholder's derivative action are relevant to the issue of the plaintiff's compliance with Equity Rule 94 (and its present counterpart in Rule 23(b), F. R. C. P.). As this Court held in *Delaware & Hudson Co. v. Albany and Susquehanna R. Co.*, 213 U. S. 435 (1909), such allegations are considered to be factors excusing the necessity of making a demand upon the corporation to institute the action. However, they are most certainly *also relevant* to the question of the proper alignment of the defendant corporation in the action, as is shown by the decisions in the *Doctor*, *Venner* and *Koster* cases.

Although, as the Petitioner points out, the *Delaware & Hudson* decision referred to *Doctor v. Harrington* in the context of its consideration of whether Equity Rule 94 had been complied with, there is no basis for inferring from the *Delaware & Hudson* decision that the holding in *Doctor v. Harrington* was not on the point of diversity jurisdiction, which, as noted above, was the single question before the Court in the *Doctor* case. Furthermore, the fact that the *Delaware & Hudson* case did not involve any question of realignment of the corporate defendant negates any inference that this Court intended to abrogate the interpretation of *Doctor v. Harrington* set forth

in the *Venner* case and in the more recent decision of this Court in the *Koster* case.

We submit that allegations of domination and control of the corporation in a shareholder's derivative action are relevant both to formal compliance with the rules of procedure of the federal court (Rule 23(b), F. R. C. P.) and to the question of the proper alignment of the defendant corporation in a derivative action. However, as to this latter point, *the question is not one of mere formal compliance with the rules but, rather, of the actual facts necessary to confer jurisdiction on the federal courts.* Where, as here, the actual facts are determined to be that the corporation is not dominated or controlled by any one antagonistic to its financial interests in the subject matter of the suit, the principles set forth in the *Doctor, Venner* and *Koster* cases required the realignment of Warners as a party-plaintiff.

Petitioner also cites *Central R. R. Co. of New Jersey v. Mills*, 113 U. S. 249 (1885) (cited by Petitioner as *New Jersey v. Mills*) and *East Tennessee, Virginia and Georgia R. R. Co. v. Grayson*, 119 U. S. 241 (1886) (cited by Petitioner as *Railroad v. Grayson*), to support his contention that Warners should be aligned as a party-defendant irrespective of the absence or presence of domination or control of Warners by persons antagonistic to its interests. We submit that neither of those cases supports Petitioner's position.

Neither the *Mills* nor *Grayson* cases were derivative actions. As appears from those decisions, they were each true class actions brought by the shareholders of the corporations involved to set aside actions taken by the respective corporations which, it was alleged, were *ultra vires.*

In the *Mills* case, the Court described the nature of the suit as follows:

> "The bill is filed by stockholders in the New Jersey Corporation, in behalf of themselves and other stockholders similarly situated, to set aside a lease made by that Corporation, acting in concert with the other defendants, of its railroad and property, in excess of its corporate powers and in fraud of the rights of the plaintiffs. All the defendants unite in defending the acts complained of and in denying the illegality and fraud charged against them. The New Jersey Corporation is in no sense a merely formal party to the suit, or a party in the same interests with the plaintiff; but is rightly and necessarily made a defendant." (113 U. S. at p. 254.)

In the *Grayson* case, the Court described the nature of the suit there involved as follows:

> "We are unable to distinguish this case from that of *New Jersey Central R. R. v. Mills,* 113 U. S. 249. It is brought by a stockholder of the Memphis & Charleston Railroad Co. in behalf of himself and any other stockholders who will contribute to the expenses, to set aside a lease made by that corporation to the East Tennessee, Virginia & Georgia Railroad Co., in excess of its corporate powers, and to restrain the Memphis & Charleston Company from carrying into effect a resolution of its stockholders authorizing a settlement with the East Tennessee, Virginia & Georgia Company by the payment of $400,000, to secure cancellation of the lease. The bill was filed by one of the minority stockholders nine days after the resolution in favor of the settlement was passed, and one of its objects is to defeat this action of the majority. Under these circum-

> stances it is clear that the Memphis & Charleston Company is not a mere formal party, or a party in the same interest with Grayson, but is rightly and necessarily a defendant." (119 U. S. at p. 243.)

Although the Court did not permit the realignment of the corporate defendant in the *Mills* and *Grayson* cases, the reason for not doing so was because the action, in each case, was by a shareholder *against* his corporation, and not "on behalf of and for the benefit of" of his corporation as the Petitioner purports to do in the instant case [Complaint, R. p. 3]. The Court carefully pointed out this distinction in the *Grayson* decision:

> "Grayson is not suing for the Memphis & Charleston Company, but for himself. It is true that a decree in his favor may be for the advantage of the Memphis & Charleston Company, but he does not represent the company in its corporate capacity, and has no authority to do so. As a stockholder, he seeks protection from the illegal acts of his own company as well as the other." (119 U. S., p. 244.)

Accordingly, it was not necessary for the Court in the *Mills* and *Grayson* cases to base its refusal to align the corporate defendants as parties-plaintiff on the ground of domination and control of the corporations by persons antagonistic to its interests. However, for the very reasons that the Court refused to so realign the parties—that the actions there involved were actually against the corporate defendants—the *Mills* and *Grayson* cases are not authority for Petitioner's position herein. To the extent that Petitioner has any standing to bring this suit, *it is because he is ostensibly suing on behalf of and for the benefit of Warners, and not against Warners.*

The decision in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288 (1936), cited by Petitioner, is in no way pertinent to the issues in the present case. Although the *Ashwander* case was a derivative action, federal jurisdiction was not based upon diversity of citizenship and, accordingly, the question of alignment of the parties did not arise and was not considered by this Court. It is true, as Petitioner states, that the *Ashwander* case held that a shareholder can, in certain cases, maintain a derivative action to assert his corporation's rights even though the refusal of the corporation's board of directors to do so was not prompted by fraudulent intent or legal duress. However, the decision of the Court on this point was solely on the basis of equitable principles applicable to derivative actions in general, whether brought in a state or federal court.

We submit, therefore, that the decision in the present case is entirely consonant with the prior decisions of this Court on the question involved. The fact that the outcome in the *Doctor* and *Venner* cases was different from that in the present case was not caused by the application of different principles of law than the District Court and the Court of Appeals here applied but, rather, resulted from the *record* before this Court. In those cases the record showed that the corporations involved were under the control of persons antagonistic to the financial interests of the corporations. In the present case, it was found *as a matter of fact*, after an extensive trial of the issues, that such antagonistic interests did not exist. Accordingly, the realignment of Warners as a party-plaintiff was proper.

III.

Disagreement Between Petitioner and Warners' Board of Directors as to the Wisdom of Instituting This Litigation Does Not Require or Permit Warners to Be Aligned as a Party Defendant in Determining the Existence of Federal Diversity Jurisdiction.

Petitioner argues (Pet. Br. p. 22 *et seq.*) that "jurisdictional integrity" requires that Warners be aligned in this action as a party defendant because, in effect, Warners' Board of Directors disagrees with Petitioner as to the wisdom of this litigation.[11]

We concede that such disagreement exists—Warners' management being more objective and realistic as to whether Warners' best interests are served by an action to accomplish the results sought by Petitioner in his complaint. However, as demonstrated in the foregoing section of this brief, the question of the proper alignment of the corporation in a derivative action depends upon whether the corporation is in the hands of persons antagonistic to its financial interests which prevent the corporation from asserting its rights, and not upon whether the shareholder and his corporation disagree as to whether to assert an alleged right of the corporation.

The discussion of this point in the District Court's opinion is both logical and persuasive:

> "For a corporation to be 'in antagonistic hands' Koster v. American Lumbermens Mutual Co., supra,

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[11]How, or on what basis, Petitioner concludes that Warners' Board stands revealed "as a sterilized Board" (Pet. Br. p. 22, fn. 11) does not appear. There is no support in the record before this Court nor any other basis for such a statement, which flies in the face of the facts found by the District Court herein [Finding of Fact V, R, p. 76].

330 U. S. at 523, or to have a 'hostile attitude,' Cutting v. Woodward, supra, at 255 F. at 635 such as would permit alignment on the side against its presumptive financial interests, surely requires more than a mere argument or difference of opinion between the corporation and the suing stockholders as to the desirability of bringing the suit. Patently, if difference of opinion were all the 'controversy' required to be shown between the stockholder and his corporation in order to preclude alignment of the latter with the plaintiff-stockholder, then there can be no occasion for all the pages of discussion of corporate domination or control, since every stockholder's derivative suit is by definition predicated upon the assumption that the corporation has refused to sue." (117 F. Supp. 781, at 802.)

Petitioner also contends that the realignment of Warners as a party-plaintiff is at the expense of "jurisdictional integrity" because it conflicts with the principles governing alignment in diversity jurisdiction cases set forth in *Indianapolis v. Chase National Bank, supra.* We submit that no such conflict exists and that, in fact, a conflict would arise if Warners were not so realigned.

The *Indianapolis* case, although it involved federal diversity jurisdiction, was not a shareholder's derivative action. The plaintiff, Chase National Bank, a New York corporation, was the trustee under a mortgage to secure certain bonds issued by the Indianapolis Gas Co., an Indiana corporation, which leased all of its assets to the Citizens Gas Co., also an Indiana corporation. During the term of the lease, the franchise of Citizens Gas Co. expired and all of its property, including the leased property, was conveyed to the City of Indianapolis. The City disaffirmed any obligations under the lease and the plain-

tiff brought an action in the federal court, on the basis of diversity jurisdiction, to compel the City's performance under the lease, joining the City, Citizens Gas Co. and Indianapolis Gas Co. as defendants. The lower federal courts rejected a contention made by the City and Citizens Gas Co. that the Indianapolis Gas Co. should be aligned in the action as a party plaintiff. There was a divergence of views in the majority and minority opinions of this Court as to what were the facts. However, the majority opinion, finding that it was by agreement with Indianapolis Gas Co. that the plaintiff instituted the action and that the basic dispute was between Indianapolis Gas Co. and the other defendants, held that Indianapolis Gas Co. should be realigned in the action as a party plaintiff and, therefore, diversity jurisdiction did not exist.

The decision in the *Indianapolis* case did not discuss, and had no need to consider the special rules relating to the alignment of the corporate defendant in a shareholder's derivative action, whereby the nominally corporate defendant,[12] in whose behalf and in whose interest the action is brought, is permitted to remain aligned as a defendant when it is in the hands of persons antagonistic to its interests.

Clearly, under the decision in the *Indianapolis* case, "the primary and controlling matter in dispute" in this action is the validity of the Warners-United contract and, essentially, Petitioner and Warners must be aligned

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[12]*Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541; 548 (1949).

on the same side in this dispute. Petitioner has instituted this action on behalf of Warners; the alleged cause of action is Warners'; any recovery obtained by Petitioner goes to Warners. The disagreement between Petitioner and Warners' Board as to the wisdom of bringing this action is ancillary to the litigation and cannot be converted into a basis for ignoring the principle that the parties are to be aligned according to their sides in the "primary and controlling matter in dispute."

As we have noted above, in Section I of this brief, this ancillary disagreement is essential to a shareholder's standing to bring a derivative action, and the adoption of Petitioner's theory would, therefore, greatly expand the scope of federal diversity jurisdiction of such cases. The wisdom,[13] as well as the logic and propriety,[14] of the present limited encroachment upon the jurisdiction of the state courts' jurisdiction, by virtue of the *Doctor*, *Venner* and *Koster* cases, has been questioned. We can perceive of no reason or justification for any further encroach-

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[13]*Lavin v. Lavin, supra.*

[14]"Resort to such realignment seems the only logically consistent course to determine whether in the case at bar there is involved the necessary diversity of citizenship. In addition to such logical considerations, I should have thought weight ought to be given to the fact that 'the dominant note in the successive enactments of Congress relating to diversity jurisdiction is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business.' City of Indianapolis v. Chase National Bank, 314 U. S. 63, 76, 62 S. Ct. 15, 20, 86 L. Ed. 47." (*Ashley v. Keith Oil Co.*, 73 Fed. Supp. 37, at p. 53 (D. Mass., 1947) (Opinion by Judge Wyzanski).)

have brought the derivative suit, his corporation must have refused to bring the action. In Section II of our brief, we discuss the decisions of this Court[8] establishing the principles on which the corporate defendant in a shareholder's derivative action is to be aligned either as a defendant or as a plaintiff, depending upon the circumstances in each case. In the cases there discussed, this Court has recognized that, under certain limited and special circumstances, and contrary to the general principle that all actions are to be prosecuted in the name of the real party in interest (which, in a derivative action, the corporation certainly is), the corporation may be aligned as a party-defendant. If Petitioner's theory were adopted, those decisions and the rule of alignment they enunciate would be rendered meaningless, and the anomalous situation in the law which they represent as an exception to the real party in interest rule would be greatly expanded without any reason or justification therefor.

In referring to this situation, Judge Learned Hand has stated as follows:

> "It may indeed be doubted whether, as an original question, the Supreme Court would not today align the corporation as a party plaintiff in all cases." (*Lavin v. Lavin*, 182 F. 2d 870, 871 (2 Cir., 1950).)

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[8]*E.g., Doctor v. Harrington*, 196 U. S. 579 (1905); *Venner v. Great Northern Railway Co.*, 209 U. S. 24 (1908); *Koster v. (American) Lumbermens Mutual Cas. Co.*, 330 U. S. 518 (1947).

II.

Warners Was Properly Realigned as a Party-Plaintiff in View of the Facts Found by the District Court.

The District Court found, in the present case, that neither Warners, its Board of Directors or stockholders were, at any time, dominated or controlled by anyone antagonistic to the financial interests of Warners [Findings of Fact IV and V, R. pp. 75-77]. The court also found that the directors and officers of Warners were in no way disqualified from enforcing Warners' rights by reason of any matters or facts set forth in the complaint, or otherwise [Finding of Fact V, R. p. 76]. In other words, the situation found by the District Court was one which showed that Warners was fully able to assert all such legal rights which, in the judgment of an independent Board of Directors, it was in the interests of Warners to assert.

The issue of the proper alignment of a corporate defendant in a shareholder's derivative action has come before this Court a number of times and, in each case, this Court has held that the only basis on which the corporate defendant is to be aligned as a defendant in the action for the purpose of determining diversity jurisdiction, is when the corporation is disabled from protecting its own interests because it is dominated or controlled by persons antagonistic to its interests.

Doctor v. Harrington, 196 U. S. 579 (1905);

Venner v. Great Northern Railway Co., 209 U. S. 24 (1908);

Koster v. American Lumbermens Mutual Cas. Co., 330 U. S. 518 (1947).

In the *Koster* case, the most recent utterance by this Court on the subject, the Court recognized the anomaly this rule created with respect to the general principle that all actions are to be prosecuted in the name of the real party in interest.[9] The Court said:

> "The cause of action which such a plaintiff brings before the Court is not his own but the corporation's. *It is the real party in interest* and he is allowed to act in protection of its interests somewhat as a 'next friend' might do for an individual, because it is disabled from protecting itself. If, however, such a case as this were treated as other actions, the federal court would realign the parties for jurisdictional purposes according to their real interests. In this case, which is typical of many, this would put Lumbermens on the plaintiff's side. Illinois corporations would then appear among plaintiffs and among defendants and jurisdiction would be ousted. *Indianapolis v. Chase Nat. Bank,* 196 U. S. 579. But jurisdiction is saved in this class of cases by a special dispensation because the corporation *is in antagonistic hands. Doctor v. Harrington,* 196 U. S. 579." (330 U. S. at 522-523.) (Emphasis added.)

The Petitioner correctly notes that in both the *Doctor* and the *Venner* cases, this Court refused to realign the corporate defendants as parties-plaintiff. However, this fact does not lessen the force of the jurisdictional rule enunciated in those cases—that the corporate defendant in a shareholder's derivative action will be aligned as a party-defendant only where it is under the domination and control of persons antagonistic to its interests in the subject matter of the litigation.

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[9]F. R. Civ. Proc. Rule 17(a).

In both the *Doctor* and the *Venner* cases, the record before this Court consisted only of the allegations of the complaint which showed that the corporations involved were dominated and controlled by persons antagonistic to the corporations' interests in the subject matter of the litigation. The opinions rendered in those cases clearly show that the Court considered the presence of the alleged domination and control as the key factor in its conclusion that the corporations there involved should be aligned as defendants, and in its consequent formulation of the exception to the real party in interest rule, which, but for such exception, would have required the corporation to be aligned as a plaintiff.

This conclusion is borne out by the decision in *Koster v. (American) Lumbermens Mutual Cas. Co., supra,* wherein the Court stated, as indicated above:

> ". . . jurisdiction is saved in this class of cases by a special dispensation because the corporation is in antagonistic hands. *Doctor v. Harrington,* 196 U. S. 579." (330 U. S. at p. 523.)

In the instant case, the facts before the Court are contrary to those which confronted it in the *Doctor* and *Venner* cases. Here, the District Court has made findings, which are supported by the evidence in the record, that Warners is not dominated or controlled by anyone antagonistic to its interests. Accordingly, under a proper application of the principle set forth in the *Doctor, Venner* and *Koster* cases, Warners was required to be realigned as a party plaintiff, as was done.

The Petitioner argues that, to the extent the *Doctor* and *Venner* decisions refer to the existence of domination and control of the corporation by antagonistic interests,

they were concerned only with procedural compliance with former Equity Rule 94 (now Rule 23(b) F. R. C. P.) and not with the existence of federal diversity jurisdiction. We submit that those cases will not bear such interpretation.[10]

For one thing, both of those cases involved questions certified to this Court. In *Doctor v. Harrington,* the question was certified as follows:

> "Whether or not the complainants' bill of complaint showed that there was such diversity of citizenship between the parties complainant and the parties defendant in this case as to be sufficient, under the provisions of the United States Revised Statutes, to confer jurisdiction upon the United States circuit court for the southern district of New York, of this cause." (196 U. S. at p. 579.)

In the *Venner* case, the same question was certified to the Court. (209 U. S. at p. 30.)

Accordingly, we fail to see on what basis Petitioner can properly contend that the decisions in the *Doctor* and *Venner* cases were not concerned with the question of alignment of the parties for the purpose of determining the existence of federal diversity jurisdiction.

Furthermore, an analysis of those cases dispels any illusions as to the fact that the Court there determined the question of federal diversity jurisdiction.

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[10]In arguing for his interpretation of *Doctor v. Harrington*, Petitioner completely ignores the above quoted portion of this Court's opinion in the *Koster* case, which he cited in his Petition for the Writ of Certiorari but which he has omitted from his present Brief.

In the *Doctor* case, which involved a shareholders' derivative suit, the lower court realigned the defendant corporation on the side of the plaintiff shareholder and dismissed the action on the ground that diversity jurisdiction was thereby destroyed. Upon certification to this Court of the jurisdictional question set forth above, the defendant contended that such realignment was proper since the interests of the corporation and the complainants were identical in the subject matter of the litigation. The Court pointed out, however, that the record before it (which consisted solely of the pleadings) showed that:

> "The defendant corporations are alleged to be under the control of John J. and Dennis A. Harrington, and that complainants are unable to secure any corporate action on the part of the defendant, the Sol Sayles Company, to redress the wrongs complained of. It is also alleged that the Harringtons controlled the action of the stockholders, and have declined to redress the wrongs complained of or give complainant any opportunity to lay before the Board of Directors or the stockholders of the Sol Sayles Co. the facts alleged." (196 U. S. at p. 588.)

On the basis of the facts thus before this Court, it was held that the corporation was properly aligned as a defendant in the action.

The fact that the decision of this Court in *Doctor v. Harrington* dealt with the question of federal diversity jurisdiction, and not Equity Rule 94, is supported by the decision rendered by this Court only three years later, in the *Venner* case. The Court, in the *Venner* case, considered as separate and distinct issues (1) the question of alignment in relation to diversity jurisdiction and (2) compliance with Equity Rule 94. As in the *Doctor* case,

ments in cases, such as the present case, involving state law and primarily of state interest.

Petitioner has access to the state courts to enforce such rights as he believes he has and the state courts have unquestioned jurisdiction over this class of cases. We submit that, under the facts involved in the instant case, he must be remitted to the state forum since federal jurisdiction is lacking.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals affirming that portion of the judgment of the District Court dismissing the first cause of action of the complaint should be affirmed.

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